No. 35.

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JAMES H. McKENNEY,
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Submitted May 4, 1898.

Supreme Court of the United States.

October Term, 1897.

ELIAS NASOLIN, et al., vs. DOLORITAS MARTIN De CORDOBA, et al.

NO. 271.

Brief for the Appellants.

WASHINGTON, D. C.
THE ADVERTISER CO.
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October Term, 1897.

WILLIAM NAEGLIN, ANNIE NAEGLIN, ANNIE NAEGLIN ADMINISTRATRIX OF HENRY KORTE, DECEASED, ET AL., APPELLANTS,

vs.

DOLORITAS MARTIN DE CORDOBA, JOSE MANUEL DE CORDOBA, JOSEFITA MARTIN DE DURAN, ET AL.

No. 271.

Brief for the Appellants.

The bill of complaint of the Appellees against Henry Korte was filed on the 29th day of March, 1886, in the Fourth Judicial District, Territory of New Mexico, County of Mora. (Record page 1).

On the fourth day of June, 1887, Henry Korte filed his answer in that Court. (Record page 18).

But before this, on the 8th day of May, 1885, a proceeding was filed in the Probate Court of the County of Mora, New Mexico, to prove Doloritas Martin, Josefita Martin, Isabelita Martin to be the natural children of Frank Metzger, deceased, and that deceased left no legitimate children and praying that they be adjudged to be heirs of the said Frank Metzger and entitled to share in the distribution of the said estate. (Record page 36).

Upon hearing the testimony the Probate Court, on the 7th of May, 1885, decided that the declaration of Frank Metzger, filed in that Court on the 6th day of May, 1872, which declaration appears on page 196 of the Record, constituted Juana Metzger his sole and universal heir and from this decision an appeal was taken by the complainants on the 8th day of May, 1885. (Record pages 34 and 35).

An amended petition was filed in the District Court, County of Mora, on the 12th day of September, 1885, to establish in that Court that the three persons named in that complaint are the natural children of Frank Metzger who died in February, 1885 leaving no other heirs. (Record pages 37 and 38).

The respondent, Henry Korte, died and his administrators, Agapito Abeyta, Jr., and Juana Metzger de Korte and his heirs, as legal representatives of Henry Korte, deceased, Annie Naeglin, William Naeglin, her husband, Charles Korte, Frank Korte and Edward Korte, his children, were made parties defendant in said cause in lieu of said Henry Korte, deceased, on the 8th day of April, 1889. (Record page 41).

A mass of testimony was taken which is printed on pages 44 to 186 of the record.

The report of the Special Master was made May 1st, 1891, and will be found on pages 198 to 204 of the record.

The final decree of the Court, filed in September, 1892, is on page 205 and sets aside the report of the Master "So far as said Master finds that complainants are entitled to any of the property referred to in their said bill and the Court further finds, upon the pleadings and proof herein, that the complainants are not entitled to the relief prayed for by them or to any relief in the premises." So the bill was dismissed.

On the 23rd of November, 1893, an appeal was taken by the complainants to the Supreme Court of the Territory of New Mexico. (Record page 206).

A decree of the Supreme Court of the Territory of New Mexico reversing the decree of the lower court was entered on September 7, 1896. (Record page 225).

On the 20th of October, 1896, an appeal was taken by the respondents from the decree last mentioned to the Supreme Court of the United States. (Record pages 228 to 229).

NATURE OF THE CONTROVERSY.

The movers in this proceeding to secure an estate are an unmarried woman named Viviana Martin, her family of children, and some others interested in the enterprise. The Martin woman never married, but had a large family of children by an admittedly miscellaneous paternity. The pater-

nity of no one of the children who are complainants in the bill, was identified by the child's name, but all of them were Martin's only. Three of these fatherless children were selected as a means to acquire an estate supposed to be large, and for this purpose their fatherhood was assigned to Frank Metzger, the maker of the supposed estate. The estate, if it existed, could only be acquired by securing the decision of a court having jurisdiction that these children were the natural children of Metzger, and that his estate was not disposed of at the time of his death. It was found impossible to secure this decision from the Probate Court having jurisdiction or from the District Court to which it was taken. Metzger's name was given to Juana, to whose mother he was not married, but it was never given to either of the children of the woman Martin.

How is it possible after the lapse of years and after the death of the alleged father to establish the fatherhood of children nameless, because of their unknown paternity, and belonging to a large family of children of a miscellaneous paternity whose mother was never married?

Plainly there can be no determination of such a question under such circumstances by any court. A declaration of the identity of the father in such a case must necessarily be a bold assumption.

Frank Metzger on the 6th of May, 1872, by solemn record made in the Probate Court, County of Mora, Territory of New Mexico, declared that the persons claiming to be his natural children and heirs were not his natural children and heirs; for he put on the records of that Court his final will and decree that the one daughter who bore his name was his one and only, absolute and universal heir of his property at all times during his life and after his death. (Record page 196).

This denunciation of the pretensions of the three children of Martin was of record in the Court where she lived from May 6th, 1872, to the 19th day of March, 1875, at which last date the children and their mother received and accepted from Frank Metzger three thousand dollars, in consideration for which she and the whole family solemnly stipulated as follows:

"And furthermore we release, discharge, and forever exonerate the said Francisco Metzger, *his heirs*, administrators, executors against any claim, demand, action, debt or debts, things and causes in law or equity, and be it whatever nature it may, be it existing heretofore, now, or in the future."

In this transaction the woman Martin and her whole family recognized, affirmed, and acquiesced in the sole heirship of Juana Metzger, which fact had been then of record nearly

three years. And this signed instrument itself shows that the three pretenders of her family were classed with all the rest; for all signed the paper together. The reason for this instrument is plain. The whole family had lived on and taken care of a ranch belonging to Metzger for some years, and like a prudent man he desired to leave to his sole heir an absolute bar to any fraudulent claim which might be made after his death. How is it possible for any court to countenance or tolerate vexatious proceedings by these people against Metzger's sole heir when, during his life for a consideration of three thousand dollars, they bound themselves to abstain therefrom?

The controlling facts in this case are too plain to be obscured by interested witnesses. Every citizen of the United States has a right, as age advances, to dispose of his whole estate after the payment of his debts as he pleases, and to retire from business whenever he sees fit to do so. Metzger's intention, as to the settlement and disposition of his estate, is made clear and indisputable by his acts before his death. He gave away as he pleased such sums of money as to him seemed best. He was for years in active business with Korte, who married his sole heir, and Korte had an equal interest with Metzger in this business. In execution of his recorded recognition of Korte's wife as his sole and universal heir, he gave to her while living of his estate whatever he saw fit. And he distributed whatever sums in money to those who had claims upon him as his judgment and benevolence dictated. After years of active partnership business with the husband of his sole acknowledged daughter and heir, he determined and carried into effect a dissolution of the partnership, and at the same time conveyed the whole of his visible estate to Korte. His right to do this can not be disputed or controverted, because he was in debt to no one and because the transaction thus effected defrauded no one. How much money he had at this time or how much value in notes and bills payable to him is no concern whatever to anybody, and at that time only concerned Frank Metzger. Whatever estate he had in this form succeeding the conveyance of all the real estate and merchandise to Korte was his own exclusive estate to do with as he pleased. If the day following he elected to transfer the whole to his sole heir or to divide it among other friends or relatives, it violated no right of anybody and no obligation of Metzger's to any one.

For these reasons the complainants have not proven that they are heirs of Frank Metzger, deceased.

But if it were otherwise, they can take no share of the property which the Special Master and the Supreme Court of

the Territory of New Mexico adjudged to be theirs as such.

The conveyance of the property by Metzger to Korte is a complete bar to the claim asserted.

If the conveyance was a conveyance made in good faith and without a fraudulent purpose, that property from the time of its conveyance belonged absolutely to Korte. His title was good against the whole world. If the conveyance was not made in good faith it was a fraud. The testimony and pleadings seem to show that the claimants asserted it to be a fraud and made for the purpose of cheating the holder and owner of a note against Metzger. If the transfer was made for the purpose alleged by the complainants, they can take nothing by their bill of complaint. The law is well settled that where property is conveyed and transferred by a person for such a purpose he who transfers the property can not maintain a suit for its recovery. Neither can any one claiming under the one who thus transfers property maintain a suit to recover the property transferred. As to these complainants, the result is the same, whether this was a bona fide transfer for full consideration or whether it was a transfer for the purpose assigned by the complainants. If these complainants are heirs of Metzger, they are bound by Metzger's act in making this transfer, and the property is forever beyond their reach.

Upon this point, Bump, in his work upon Fraudulent Conveyances says, page 445 par. 432:

"The statute (of Frauds) was designed solely to protect the rights of creditors, and consequently it renders a fraudulent transfer void only as to them, and makes no provision whatever in regards to its effects between the parties. This is the effect of the word 'only.' This word was inserted to restrict the broad provisions of the statute to the rights which the legislatute designed to protect, and thus left the relative rights of the parties to the provisions of the common law. A conspiracy to defraud creditors is a defence against good morals, common honesty, and sound public policy, for it is a let and hindrance to the due course and execution of law and justice, and tend to overthrow all true and plain dealing, bargaining and chevisance between man and man; without which no commonwealth or civil society can be maintained or continued. It is therefore a proper case for the application of the maxim: "In pari delicto melior est conditio defendtis." Porro autem si et dantis et excipientis turpis causa sit, possesstorem potiorem esse et ideo repetitionem cessare. The principle that a collusive contract binds the party to it is a principle which commends itself no less to the moralist and to the jurist for there is no obligation upon any one to extricate a rogue

from his own toils. On any other principle a knave might gain but could not lose by a dishonest expedient and inducements would be furnished to unfair dealing if the law were to repair the accidents of an unsuccessful trick.

A fraudulent grantee therefore is allowed to retain the property, not for any merit of his own but for the demerit of his confederate in accordance with a wise and liberal policy which requires that the consequence of a fraudulent experiment shall be made as disastrous as possible.

The law endeavors to environ a debtor with all possible peril and make it appear that honesty is the best policy."

Stewart *vs.* Kerney 6 Watts. 453, 31 Am. dec. 482.

Falconer *vs.* Jones 3 Dev. 334.

In paragraph 433 Bump further states:

"A fraudulent transfer is good as against the grantor his heirs, executors, administrators, parties claiming under him, and his agents, vendees and grantees."

In connection with this part of the case it should be noted that the complainants have introduced witnesses by whom they establish the fact beyond question that the transfer was made in good faith and for full consideration. This was accomplished when they showed that Metzger shortly afterwards claimed that Korte owed him $12,000, and that Korte admitted it in presence of the witness and gave a note for that amount to Metzger. It is no affair of these claimants whether Korte paid that note to Metzger, and Metzger gave away the money to his sole heir or to some one else worthy to receive it. Metzger had the right to give away the note or the money received for it. The fact is established, however, that at the date of the transaction Korte owed Metzger on account of the property transferred to him about twelve thousand dollars after the payment of the money to Metzger at the time of the conveyance of the estate.

The bill of complaint and the testimony present for determination of the Court two questionsr: First, what estate and property did Metzger own at the time of his death and, second, who is entitled to that estate?

It is conclusively determined by the evidence that he left no personal estate whatever, except a few things of nominal value. It is manifest from this that he disposed of, during his life, to his own satisfaction, all his moneys, notes, and movable property. The evidence further shows that he owned at his death no real estate whatever. He once owned a large estate, but he deliberately and of his own motion conveyed the whole of that estate in 1873 to Korte and to Korte and his wife. Before that date Korte was his partner in business, and Metzger, as such partner with Korte, also owned

real estate, the interest of each in such real estate being equal. Metzger, up to that time, owned a large amount of real estate in his own right. It was not partnership property. The partnership business of Metzger and Korte never included this real estate owned by Metzger. Metzger conveyed to Korte the whole of the estate which he owned in his own right, and he conveyed to Korte his half interest in the real estate which before that he and Korte owned as partners in the business. Before this transaction and in 1872 Metzger put on record in the Probate Court his will constituting "Juana Metzger, wife of Henry Korte, and daughter of Apolonia Guiterrez, deceased, as my natural, and only absolute, and universal heir of my property which I possess, and whom I declare that by this my declaration, submitted to your honorable court, she, the said Juana Metzger, wife of Henry Korte, deceased, may enjoy the right, privileges and prerogatives of a daughter of mine, recognized as such by me, the undersigned, for her benefit at all times during my life and *after my death*." To this record Vicente Romero, probate judge, affixed his certificate that this declaration, thus given and recorded, "has been of his own free will and of his sound mind and that he signed the same, signing his name with his own hand in Mora, this 6th day of May, of 1872." Thus it appears that when Metzger, in 1873, made this transfer of real estate he was, in fact, carrying out the intention expressed in his recorded will by conveying to Korte and to Korte and his wife, the very estate that he intended to go to Korte's wife if he retained ownership thereof up to the time of his death. The deed on page 192 conveyed in terms the home property in Mora to "Henry Korte and Juana Maria Korte de Metzger, husband and wife."

At the date of this transaction, if the evidence is to be believed as to the profits of the partnership business, as to Korte's business qualifications, and as to his cash capital outside the partnership capital when he entered into partnership with Metzger, Korte must have had a large amount of cash. He made the cash necessary to pay to Metzger and this cash was exhibited to the witnesses to the deeds. It undoubtedly passed to Metzger. Metzger had the right to dispose of this cash as he saw fit. It can not be doubted, in view of his recorded will, that all of his estate of this character which he saw fit not to bestow on other relatives and friends before his death, was used in execution of his recorded will. After this transfer of real estate, during a period of about twelve years up to the time of Metzger's death Korte exercised exclusive ownership in his own right of this estate. That ownership was never disputed. He paid taxes on the whole estate and

controlled the whole estate. It was entirely reasonable and natural that Metzger, who had made his wife his sole heir and who made his home with his sole heir and her husband, should be reverenced and respected by Korte and his wife and that the greatest deference should be paid to his opinion and judgment in respect to the management of the estate which he had conveyed to them.

The whole evidence shows the attempt to make this estate partnership property under the firm name of Korte to be a mere pretext. There was no partnership and there was no reason for any partnership between Metzger and Korte under the firm name of Korte. It is preposterous to assert that Metzger and Korte dissolved partnership in 1873 and made an absolute, complete settlement in respect to all partnership property in order to conduct thereafter the partnership business under the name of Korte. If such had been the intention of the parties all that was needed was to give notice to the public accordingly, that the partnership business heretofore conducted in the name of Metzger and Korte would hereafter be conducted in the name of Korte. There was no reason whatever, if such was his purpose, for conveying real estate before that owned by Metzger to Korte.

At the time of Metzger's death Korte had an undisputed titleto the real estate now sought by the complainants to be converted by the court into an estate belonging to Metzger. By the record the claimants and the whole world had been informed for twelve years that the estate was Korte's and not Metzger's. If the estate was Metzger's and not Korte's, Metzger must have conveyed it to carry into effect some purpose which required the concealment of his estate. A great mass of evidence was taken, the witnesses being Mexicans or persons interested in making it appear that Metzger owned the estate and had conveyed it to Korte to conceal his ownership. To satisfy the Court and the Special Master that this was true, a suspicion of a fraudalent purpose and motive for the concealment of Metzger's ownership was successfully introduced. This suspicion was based on an assumption that there was a note of Metzger's in existence, the payment of which Metzger attempted to avoid by his concealment of ownership of the estate. The complainants undertook to create this motive on the part of Metzger for the transfer of the estate, by the witness, Morrison, on page 47 of the record. He was asked if he knew anything about Metzger having made a conveyance of his property in the name of Henry Korte.

A. "Yes, sir."

Q. "Now, state what you know."

A. "I don't recollect the exact date or time, but Metzger

and Henry Korte came to Las Vegas and stopped at my house. Among other things, he related to me he was under embarrassment about a certain note he had to pay, and he had paid it once before. That he was very much hurt about paying it, and that it amounted to eight or nine thousand dollars over his property in Henry Korte's name, in order to save himself."

Below, on the same page, the same witne s testifies that about a month and a half later when at Mora he asked Metzger "How he got along with that note, and he replied that he thought he had better pay it and be done with it."

Thus, it appears that the complainant's own witness shows that the pretended motive for the transfer was a sham motive set up by the complainants. There was no note of Metzger's, the payment of which he intended to avoid. There was no reason whatever for the concealment of Metzger's ownership of the property. The transfer was made without any fraudulent purpose whatever and because Metzger willed it by his own free will and act. Another absurd reason for the transfer was attempted to be created by the romantic statement that some of the witnesses understood that Metzger intended to go to Europe. It seems he never went. If he had conveyed the estate for that reason it is manifest that he conveyed it for the purpose of settling the estate substantially as he had by will recorded in 1872 that his estate should be settled. It is plain that if Metzger had not intended the transfer he made to be a final settlement of his estate, that some time during the twelve years in which he lived with Korte, and his sole heir after the transfer was made the title of the estate would have been changed. The transfer is thus shown to be on the part of Metzger a final disposition of the estate. That estate at the death of Metzger was an estate belonging to Korte and to Korte's wife and not to Metzger, and this was by the free and voluntary act of Metzger himself, never disputed by either Metzger or any other person up to the time of his death. All the evidence shows the title of the estate by record in Korte and his wife.

These considerations make a final disposition of the pretext set up of an estate of Metzger's in these lands.

The second question, as to who at Metzger's death were entitled to his estate, has perhaps already been sufficiently discussed. The evidence shows that Metzger made a record that it was his will that Juana Metzger, wife of Henry Korte, should take at his death his whole estate. It is singular that the Special Master should attempt to set aside this will of Metzger's and adjudge that three Mexican girls of the name of Martin, so ignorant that they can not approximate the dates of their birth, to be joint heirs with Juana Metzger, who was

made sole heir by Metzger and thereupon give the whole alleged estate of Metzger's to the three Mexican girls. These three ignorant Mexican girls, during Metzger's life, were fatherless for they had no father to give them a name. Their mother testified that she was the mother of seven living children and that she had one child that died, and she distributes the family between three or more fathers, although she never married. It appears on page 197 of the record in a paper signed by the members of this remarkable family, as a final settlement with Metzger on whose ranch they had lived for some years, that the three members assigned to Metzger were the only members without a name of their father. One was named Bonne after his reputed father; one was named Eberle after his reputed father; another has the name of Laumbach attached to her first name, Eleanor; another had the name Marta attached to her first name, Maria. Metzger gave his own name to the only daughter and child he ever acknowledged to belong to him.

Upon these facts the Special Master entered the following opinion: "That Metzger voluntarily set about devising ways and means to disinherit and cut off from any share in his property these complainants, his helpless daughters, with a dark shadow thrown across their lives, is beyond credence and unworthy of belief."

That is, the Special Master affirms that three Mexican girls, whose paternity during the whole of Metzger's life was disaffirmed by his acts, and disowned as heirs by the record of his will in the court, and disowned by him as heirs by the entire distribution of his estate to others before he died, were his acknowledged daughters and heirs and that he did not intend to disinherit and cut them off from a share in his estate.

The conclusion of the Master upon this point is equivalent to the affirmation that facts conclusively proven by the evidence are incredible and that therefore the Court in its decree will assume the facts to be the reverse of those proven.

The Martin woman and her flock were silent for thirteen years after Metzger made a record of his will that Juana Metzger was his sole heir and they were silent ten years after she, for herself, and after her flock solemnly renounced all claims upon Metzger's living, and all claims upon Metzger's heirs, executors, and administrators after his death. It was not possible after Metzger's death to prove his fatherhood of any of her nameless brood except by her own testimony. The ignorant girls who did not know approximately in what year they were born could know nothing of the unsolved mystery of their paternity. After Metzger's death the knowledge of this, if in fact any knowledge existed,

was necessarily limited to the mother who gave the only name to the girls they ever had. In other cases, where more definite knowledge existed, her children had the names of their different fathers. Consequently, for the Master of Court to find or decree that these girls are the natural daughters of Metzger, that finding or decree must be based on the testimony of the one witness who alone has knowledge of that fact and who waited until Metzger's death before she asserted that claim. The Court will notice that this woman swears that for years she had sexual intercourse with the man who had sexual intercourse with her mother, and who had a daughter by her mother. How can any court in christendom believe such testimony and distribute the estate of a man upon the basis of such testimony.

CONCLUSION.

The evidence establishes the fact first, that Metzger died leaving no essate, having settled and distributed his entire estate before his death.

Second, Juana Metzger, wife of Henry Korte, is the sole heir of Metzger. Consequently the complainents are not joint heirs of Metzger with Juana Metzger the wife of Korte.

The decree of the Supreme Court of the Territory of New Mexico should be reversed and with directions to that Court to dismiss the complainants' bill, the costs to be paid by the said complainants.

HARVEY SPALDING,
Attorney for Appellants.

Partial Analysis and Comparison of Testimony with the Report of the Master.

The report of Special Master Koogler seems to be a mass of errors, inconsistencies, and erroneous conclusions from premises wrongly assumed as proven.

For a moment let us submit to his findings of fact.

Assuming that Metzger and Korte were in partnership at the time of Metzger's death, and that Doloritas, Josefita and Isabelita Martin were the natural children of Metzger and entitled to a share of his property, are they not barred from ever claiming any sum of money or property, as they have failed to surrender the $3,000 paid by Metzger, as claimed by Viviana

Martin, because they were children and possible heirs of Metzger and entitled to support? See evidence of Viviana. Martin, page 67:

A. The only paper I signed was the receipt I gave to Don Francisco not to ask him for any subsistence during his life.

Q. You are sure, are you, that that is what the receipt contained?

A. Yes, sir.

Q. Was the receipt read over to you?

A. They read it over to me, and he told me to conform myself with what he gave me for my subsistence.

EXHIBIT M.

Know all men by these presents, that we, Viviana Martin, resident of La Cebollo, County of Mora, Territory of New Mexico, and Ramon Bonne, Andreas and Eleanor, wife of Andreas Laumbach, sons and daughters, who are of age, of the said Viviana Martin, and Maria Marta, Doloritas, Josefita and Isabelita, minor daughters of the said Viviana Martin, and represented by their mother, the said Viviana, as natural guardian for said minors, all residents of the County of Mora, in the Territory of New Mexico, for and in consideration of the sum of three thousand dollars ($3,000), to us in hand paid by Francisco Metzger, resident of the p'aza of Mora, county of Mora, Territory of New Mexico, the receipt of which is hereby acknowledged, by these presents we have released, discharged and forever exonerated, and by these presents we do release, discharge and forever exonerate, for ourselves, our heirs, administrators and executors, from any action or demand, debt or debts, thing or cause, of any nature whatever; and principally upon any claim against our mother, the deceased Polonia Guitteres, be it on account of inheritance or any other thing, cause, or reason; and also against any claims for personal services of whatever nature, done by the said Viviana Martin, or her daughters, or sons at any time heretofore, now, and in time gone by; and furthermore, we release, discharge, and forever exonerate the said Francisco Metzger, his heirs, administrators, and executors, against any claim, demand, action, debt or debts, things and causes in law or equity, and be it of whatever nature it may, be it existing heretofore, now, or in the future; and these presents are made, executed, and signed with the purpose and principle object that they may serve as a receipt to the said Francisco Metzger, his heirs, administrators and executors, of every and all of the reasons and considerations herein mentioned.

In testimony of which we have placed our hands and seals this 19th day of March, A. D. 1875.

her
VIVIANA x MARTIN. [Seal.]
mark

his
RAMON x BONNE. [Seal.]
mark.

her
ELEANORA x LAUMBACH. [Seal.]
mark.

her
ANDRES x EBERLE. [Seal.]
mark.

MARIA MARTA.

DOLORITAS.

JOSEFITAS.

ISABELITA.

By their mother and natural guardian.

her
VIVIANA x MARTIN. [Seal.]
mark.

Attested and witnessed by—

his
JESUS MA. x GALLEGOS. [Seal.]
mark.

his
FELIPE x GALLEGOS. [Seal.]
mark.

FRANCISCO GALLEGOS.

This paper, quit claim, or release, bond or contract, whatever it may be called, and the testimony above noted would indicate that Viviana Martin and her children received before Metzger's death their share of the estate. Until they have repaid this $3,000 they are certainly barred from asking relief of any court of equity. Viviana Martin claims that this money was paid simply to secure immunity from all demands during the life of Metzger but the release, itself, shows the contrary.

The judgment of the Master, set aside by the Court and finally affirmed by the Supreme Court of New Mexico, is in itself a contradiction. We call attention to page 203 of the Record. from which we quote:

"The Master concludes that, considering all the circumstances of the case, in connection with the presumptions that may be reasonably indulged and the misgivings and mysteries

attending it, the visible property should be equally divided between the two parties to this suit, the complainants and the heirs and representatives of Henry Korte; that is, the complainants, Doloritas, Josefita and Isabelita Martin, should be each decreed to have an undivided sixth interest in the following ranches:

The Pinard, or Buena Vista ranch; the Sebolla ranch, the houses and lots in Mora; and also in the following property, in case Henry Korte had not disposed of it previous to his death to innocent purchasers: The Leonore Beaubien property, the William Bandford property, and the land in Agua Negra; and that the other undivided half of such property should be decreed to belong to the heirs of Henry Korte and wife.

The witnesses differ so widely upon both the value and extent of these houses and lands that I do not see how any other form of decree can be rendered in the case without taking further testimony on these points."

The Master states and the evidence shows that Korte had at least a one-half interest, except in that portion of the real estate referred to in Exhibit E and 204, page 192. This portion of the property is deeded to Henry Korte and Juana Maria Korte de Metzger, husband and wife.

The judgment or opinion of the Master can not apply to any share of real estate admittedly belonging to Korte or to Korte or his wife. The three complainants therefore under a reasonable view of the opinion of the Master can not each claim more than an undivided one-sixth interest in the share of the property belonging to Metzger. It is submitted that the property deeded to Korte and wife can not be classed as partnership property as it can not by any possible means be deemed to be the property of Metzger and Korte doing business under the firm name of Henry Korte. The power and right of Metzger to give away or deed his property has not been questioned nor can it be except by some creditor who may be defrauded by his gifts and transferees. From the undivided one-half interest in Metzger's share of property must also be deducted the $3,000 paid by Metzger years before his death to Viviana Martin and her children.

We deny, however, that Metzger had any financial interest in the business or real estate in the hands of Henry Korte at the time of Metzger's death.

As to the general worthlessness of the Master's decision we refer to pages 202 and 203 from which we quote:

"Another transaction had about a year previous to this dissolution whereby Metzger made a declaration attempting to constitute the wife of Korte his sole and universal heir and

thus to exclude these complainants and cut them off from any participation in any property he might leave at his death does not look right for a man endowed with natural affection for his offspring and unfortunate offspring at that. These two circumstances were likewise followed by another unnatural and unusual one, in March, 1875, when a settlement was had between Viviana Martin and Frank Metzger, whereby Metzger paid to Vivian some two-thousand dollars worth of cattle for personal services, and Viviana signed a release on behalf of her minor children, these complainants."

A few lines below at bottom of page 203 read again:

"That Metzger voluntarily set about devising ways and means to disinherit and cut off from any share in his property these complainants, his helpless daughters, with a dark shadow already thrown across their lives, is beyond credence and unworthy of belief. If Henry Korte connived at it and sought to further it by machinations, he ought not to be permitted to enjoy the fruits of such a wrong." Now, what can be expected from any opinion from a Master who states one fact at the top of a page and the absolute converse at the bottom? Yet this opinion, or rather that portion below center of page 203, is referred to with approval by the Supreme Court of New Mexico. See page 211:

"The Master found that Korte had not in reality paid much of anything for the property, and that in truth and in fact Metzger and Korte were partners after the conveyances. The Master expressly found that it was not the purpose of Metzger to disinherit his children, the complainants, and he recommended a decree in their favor." For some reason the facts as stated at the top of page are overlooked in the Court's decision. The Supreme Court of New Mexico also stated: "The Master had opportunities of judging as to the weight of the testimony by personally having been present at the taking of the evidence." It is on this assumption apparently that their conclusions are reached. Facts are, as shown by evidence and record, that evidence of witnesses was not taken by Koogler, as he only identified certain exhibits, etc. Another point in the report of the Special Master, showing oversight on his part, see page 199 of the Record. Master's report states that he accepted a receipt for $18,330. See Exhibit, page 195, and it will appear that $18,330 in cash and ($2,300) two thousand three hundred in book accounts are referred to in the receipt. Did not the Supreme Court of New Mexico err in giving credit to opinions of law and statements of fact where on the face of the report such errors and contradictions are seen. We will now proceed to compare the report of the Special Master with facts as shown by the evidence.

As to his statement Number One, page 198, it seems to be clearly proven that during Metzger's life he handled large sums of money, etc. We deny that proof shows that he had any accumulated property at time of his death. It seems to us that about the entire possessions of Metzger in 1873 consisted of the $20,630 received for his share in the partnership business and for his real estate, etc. Of this he gave Viviana Martin $3,000, his nephews, brothers and sisters certain sums, how much is not known. See evidence William Gandert, page 164. And apparently a large debt referred to on the same page was paid after 1873. All the evidence indicates that Metzger was not paid wages by Korte, and if his natural expenses and gifts were taken out there would be little money left at his death. Attention is called to evidence of Gandert, page 164.

Q. Do you know how much Frank Metzger paid his nephews?

A. No, sir, he told me nothing about it. He only said, "I gave them their share, what it would come to."

We also deny that he died intestate.

As to his statement number two. The Master's statement that Apolonia Guitteers was married to Bernardo Martin can not be presumed to be proven in any satisfactory way. Being Catholics, record evidence could have been produced or failure accounted for. The statement that Viviana Martin had three children by Metzger and that she was unmarried is assumed, not proven. In fact, we doubt if paternity of these children could be proven. From description of the woman her knowledge of the subject must be vague. Viviana Martin, herself, admits illicit relations consecutively with three different men and no others. From her character and evidence the no others must be assumed as well as that she was faithful to each man in turn. Record proof of birth should have been furnished or inability accounted for. Is it not possible or even probable that Metzger's care for children was owing to relationship of Viviana Martin to wife of Henry Korte, they both being daughters of Apolonia Guitteers. The wording of receipt for the $3,000 seems to make this a reasonable explanation. It should be noted that all children of Viviana Martin sign this receipt. Why should they if the relationship or reason for interest only applied to the three complainants?

Statement of fact Number Four seems to err in concluding that Metzger resided equal portions of his time at Mora and at Cebollo ranch with Viviana Martin. Evidence shows that prior to 1873 Metzger was actively in business, being partner in a store at Mora, and also was interested in various other lines of business. All the evidence indicates that he was a

business man, and he certainly could not afford to spend one-half of his time at the Cebollo ranch. The evidence clearly shows that for some time prior to March, 1875, he had not been to the ranch at all. He died February, 1885; so for over ten years he did not have any dealings with Viviana or her children.

The fifth and sixth findings of fact are correct, except the receipt states $20,630 instead of $18,630 as given by the Master. Attention is also called to the declaration referred to in the fifth finding of fact. See Exhibit L, page 196.

EXHIBIT L.

(*Translation from the Spanish.*)

TERRITORY OF NEW MEXICO, }
COUNTY OF MORA. }

HON. VICENTE ROMERO, PROBATE JUDGE IN AND FOR THE SAID COUNTY:

Honorable Sir: Very respectfully I appear before your honor and make my declaration, affirming that I recognize and consider Juana Metzger, wife of Henry Korte, residents of said County of Mora, and daughter of Apolonia Guitteres, deceased, as my natural and only absolute and universal heir of my property, which I possess, and whom I declare, that, by this, my declaration, submitted to your honorable court, she, the said Juana Metzger, wife of Henry Korte, deceased, may enjoy the right, privileges and prerogatives of a daughter of mine, recognized as such by me, the undersigned, for her benefit at all times during my life and after my death, and I desire also that this be filed and remain of record on the records of the Probate Court of the aforesaid County of Mora.

I declare further that, however, I am commonly known by the inhabitants of this County of Mora and throughout other places by the name of "Don Francisco Metzger," but my real and proper name is "Frederick Metzger," as I subscribe my name on this declaration, this 6th day of May, 1872.

(Signed) FREDERICK METZGER.

I, Vicente Romero, Probate Judge in and for the County of Mora, Territory of New Mexico, do certify that he who subscribed his name to the foregoing declaration, under the name of "Frederick Metzger," is well known to me by the name of "Frederick Metzger," and that the declaration he has given has been of his own free will and of his sound mind, and that he signed the same, signing his name, with his own hand, in Mora, this 6th day of May, of 1872.

(Signed) VICENTE ROMERO, *Probate Judge.*

By the Probate Judge:
ANASTACIO TRUJILLO, *Clerk.*

This seems to be intended for a will, being recorded in the Probate Court and any property of Metzger left at his death should under this go to Julana Korte.

The 6th fact found is that transfer of business and property was a blind and that Metzger and Korte were still partners

doing business under the firm name of Henry Korte. We submit if this were so it could have no effect on the real estate transferred prior to Metzger's death. The testimony as to the continuance of the partnership in the store is indefinite, hearsay, and certain portions are given by the attorneys and promoters of this suit. The evidence of Viviana Martin and her daughters is not worthy of the slightest consideration in proving a partnership as it clearly shows that it is not given from any personal knowledge. Evidence of Rafael Romero, Veeder and Wm. Nolan should be taken very carefully, see testimony of Romero, on page 133 which shows that they all have a contingent interest in the case. This narrows down the evidence tending to show a continued partnership. Even this is hearsay, based on opinions formed because of seeing Metzger around the store. Korte undoubtedly consulted Metzger about business matters, possibly on account of Metzger's more mature judgment or from the natural deference due to the source of his prosperity and the father of his wife, or even possibly for the mercenary desire to please one in whose hands there was still money which could be withheld from his wife. It would seem that any of these reasons sufficiently explain their close relations. This is not a partnership or proof of a concealed partnership. Certain of the witnesses have stated that Metzger admitted they were partners but it usually narrows down to stating that he was interested, etc. The evidence of Arthur Morrison is the most specific on this point. He gives as a reason assigned by Metzger for deeding the property and business, that Metzger desired to avoid paying a note of $8,000 or $9,000. This note was probably paid later on and accounts for a portion of the money paid at the purchase of the business by Korte, see page 47. Even this witness, on cross-examination has to admit that he did not live in Mora and that it was only his opinion that they were partners at the time of Metzger's death, see page 49.

Q. "Can you tell me within a year of the time he spoke to you about his business connection with Henry Korte?"

A. "In 1880, after returning from the States I went to Mora and remained two or three days. I asked how he got along, and so on. He told me all right; he was getting very well. But he was growing very tired of business; he was satisfied that Henry was all right, and was well satisfied with Henry. That was the drift of his conversation."

This statement indicates that Metzger was out of business the last time Morrison saw him in the Fall of 1884. His reasons for knowing that the Martin woman was not married at the time of her relations with Metzger are to say the least very original. See page 51 and 52:

Q. "You say in your testimony that the mother of these children was not a married woman when they were born. How do you say so?"

A. "Because she had cohabited with another man heretofore. What I mean to say is that she did not live with a man for two years before."

Morrison's conclusions seem to conform to appellees wishes. Attention is called to page 55:

Q. "From that time, 1873, is it not true that Frank Metzger and Henry Korte were together engaged in business at Mora?

A. "Metzger was engaged in business; Korte, I supposed at that time, was a helper or clerk.

Q. Leaving supposition at one side, do you know that Frank Metzger and Henry Korte did not form a copartnership in business in which they were to be equally interested, equal owners, in the year 1868, or about that time?

A. I do not know any thing about such an arrangement.

Q. Do you know then there was not an actual transfer by Frank Metzger to Henry Korte of one-half of the interest in the business of Frank Metzger to Korte?

A. I don't know anything about it.

There is absolutely no doubt that Metzger and Korte were partners previous to 1873, yet Morrison, who claims, one might say, to be the confident of Metzger as to his most private affairs, business and personal, shows his absolute ignorance of a partnership known to the public in Mora. Is it not clear that his testimony is all of doubtful force and authority?

Evidence of Louis Kaahn as to partnership is worth nothing as evidence, as he, himself, on page 87 states that Metzger might have had interest in merchandise business and might not?

Antonio Domingo Lopez, an employee of Metzger and Korte, is brought forward to prove partnership but on examination he is very hazy, in fact, states that he knows that they were partners over fourteen years ago, that is in 1873. He is very doubtful as to dates and as partnership ended June, 1873, evidence certainly does not show partnership at death. (See page 95).

John H. Mink is another non-resident of Mora in whom according to appelles Metzger had great confidence but his story is not the same as Morrison's. He states:

A. Yes, sir; he told me that he had transferred to Henry Korte some property, and he mentioned it whatever it was, and that Henry Korte acknowledged himself indebted to him ten or twelve thousand dollars. Perhaps about half an hour after that conversation I asked Metzger if he had anything to

show for that indebtedness, and he told me he didn't think it necessary, that Henry would deal right with him, something of that kind, that he would do what was right, that he entertained no fear. I suggested to him the propriety to take a note from Henry Korte. Henry Korte agreed to that and both told me to write out a note. I wrote out a promissory note for about ten or twelve thousand dollars, I believe, I do not know if the note was with interest or not. And I believe I made it payable some months after demand. I am not quite certain about that, but I remember something of that kind. I turned the note over to Metzger. I gave the note to Metzger, after it had been signed by Henry Korte in my presence, and Metzger ordered Henry to put it away in his desk or safe or some place. Of course there was some other talk, but I don't remember it.

Q. "To whom was that note made payable?

A. "It was made payable to Frank Metzger or to his order, I believe.

Q. By whom was it signed, if any?

A. By Henry Korte, and perhaps by me as a witness.

Now, by their own witness, they claim continued partnership to be shown on account of no consideration and a fake transfer, and a dissolved partnership with balance due for the purchase of property and interest in business. If Mink is correct, partnership was clearly dissolved and Metzger was worried as to payment. If Morrison and others are correct there was no consideration. These are all appellee's witnesses.

Juan Jose Gallegos is produced by the complainants and though he saw Metzger daily, he did not know whether Metzger claimed to own interest in the store. If he had been a non-resident and seen the parties once a year probably he could have sworn that Metzger confided in him, that he was still a partner, etc.

Rafael Romero, one of the promoters of this suit, though quite young, being only thirty in 1888, and fifteen at the time of the dissolution of partnership, has decided ideas as to the value of property, revenue obtainable, etc. See page 123.

Q. What other piece of real estate, if any, do you know of that was held in the name of Henry Korte at the time of the death of Frank Metzger and that belonged to Frank Metzger at the time of his death?

A. There was a house and lot in the town of Mora.

There is no doubt in his mind as to the ownership though it is proven that this was deeded to Korte and wife in 1873 and that taxes were paid by them and not Metzger. The testimony of Romero goes on to show that a partnership existed but the animus is so plain and even if from a disinterested party is so indefinite and a matter of opinion that it seems to

us of little weight. We again refer to the fact that witness has an interest in the result. Admission is made, however, that cattle were branded, H. K. (See page 133). This bears on question as previous to the dissolution of partnership there was apparently a different brand. (See bill of Sale.)

Fernando Nolan, attorney for complainants and possible beneficiary, (See page 133, evidence of Romero) is a non-resident and confident of Metzger apparently resulting from Nolan's calls to borrow money. His testimony, page 137, states that needing a larger sum of money than usual he went to Korte who refused to lend the same without Metzger's approval but as Metzger's approval was obtained the money was loaned which witness states he repaid to Metzger in person. Why did Nolan apply to a minor member of the firm instead of Metzger at first? Does not this evidence plainly show that it was understood that Korte was in business alone?

It is natural when a business man does not desire to make a loan, or is doubtful as to advisability, to consult with a friend, or even a clerk. Why should it be deemed strange to consult Metzger in view of their personal relations?

See foot of page 138:

A. "I now remember one time he said that Henry didn't have nothing but the name: that he was the owner of the property. One time he got a little excited here. We were at the house of Mr. Green that day, and old man Green was joking with him, telling him that he didn't have nothing; that he was a poor man."

Q. "Told who?"

A. "He told Metzger. Old man Green told Metzger that Henry had everything. Frank Metzger answered him that he was badly miztaken; that if there was any poor man there it was Henry Korte; that he was the owner of everything and Henry Korte did not have but the name of having, but he didn't have."

This point will be referred to later, but it is cited as showing what Mora people thought as to business relations of Korte and Metzger, though we do not admit that the above answer is correct.

Page 140. This witness attempts to put into the mouth of Korte statements that he was still in partnership with Metzger at the time of Metzger's death. Korte's answer is the best evidence on this point. This same witness on page 150 states that Metzger stated to him that he had no other children than Juanita, Korte's wife.

Page 151. On cross-examiuation he seems to admit that he knows nothing about whether partnership was dissolved or not.

Q. "Have you any knowledge that Henry Korte didn't buy out the interest of Frank Metzger after their partnership was established?"

A. "I don't dnow anything about it if he did buy it."

Q. "Have you any knowledge that he didn't do so?"

A. "No, sir."

Q. "So far as you know he might have done so, is it not true?"

A. "He might have done that, I don't know.

Wm. Gondert is another out of town confident. See page 158:

Q. "Now state what that conversation was with Frank Metzger in the presence of Henry Korete?

A. "Well, it was in 1877 or 1878; I am not certain of the date or the year. I think it was in 1877, or may be 1876. One night we were down at Henry Green's. We had played dominoes, and Frank Metzger and Henry Green got into a kind of a quarrel. Green was a little excited, and he told Metzger that he was no man, that he was a 'peon;' that he was a man that had no property; that he was working for twenty-five dollars a month, and Frank got a little excited about that, and they had quite a quarrel there. It was in the night and I went home with Frank, and Korte opened the door for us, and we went into the house. Korte was there. Henry Korte asked: 'What is the matter, Frank?' 'Well' he says, 'that God damned Green he insulted me. He told me I was a peon. I can buy him and the whole town here with my own cash money, and need not take my property. I can buy it with cash money'. Then he went into a room and brought out a square box, one half the size of that table (referring to a table about three-and-one-half-feet long.) It was not very high; it was more like a drawer and it was filled with gold, fifty dollar pieces in it, twenty dollar pieces, ten dollar pieces, five dollar pieces, and they were all piled up in this box."

Now is it not puerile to bring in the result of a quarrel as proving a partnership? Metzger had money at that time probably what remained of the purchase money of business and property. Gandert could not be forced to testify that Metzger specifically stated that he had other property. Note the following question and answer:

Q. "Didn't Metzger say there that he not only had that, but he owned all the interest he ever owned in the ranches, property and store?"

A. "He said he need not take his interest in the property, what he had, but he could by the town with cash money."

What was said certainly does not apply to the business and property. On page 159 the evidence shows that at last they

succeeded in broadening the statement by asking leading questions and suggesting answers desired. This witness and others make much of the fact that both Korte and Metzger spoke of business as our business, etc. The bootblack at the Arlington speaks of our house and our hotel, but we do not think a thousand hearers could convince the Court that such a statement concealed a partnership. This witness on page 161 states that Korte treated Metzger more like a father than partner, but immediately by a leading question he is induced to state differently.

John D. W. Veider and Fernando Nolan, attorneys for complainants and expectant receivers of a contingent fee state that Korte testifies that he was partner with Metzger at his death, but on cross-examination Nolan weakens. (See page 167).

Instead of a mass of testimony in reality consisting of opinions based on memories of conversations or on hopes, the appellants offer little oral evidence to show that partnership was ended. But rely on record evidence. (See Exhibit H).

This notice to the public is in connection with the deeds and witnessed transfers sufficient to show the end of the partnership. Attention is called to the care with which the deeds and transfers are drawn up.

Exhibit D and 200 is a warranty deed of Frank Metzger's Cevollo ranch.

Exhibit B and 201 is a quit claim deed for the Agua Negra tract.

Exhibit A and 202 is a quit claim of the Beaubin and O'Neil tract, or at least of the undivided one-half interest owned by Metzger and also a quit claim of one-half interest in the "Bill Mansfield" tract. Both of these pieces of property had been bought by the firm of Metzger and Korte, probably from the profits of the business. How can the interest of Korte be taken away by the Master's report?

Exhibit C and 203 is a warranty deed covering the Buena Vista ranch from Metzger to Korte.

Exhibit E and 204 is a warranty deed covering the store and home of Metzger to Korte and his wife.

Exhibits I and K show the transfer of the interest of Metzger in the business and stock. It should be noted that this transfer is for the undivided half interest.

Exhibit J is a copy of the receipt for money and book accounts transferred to Metzger in full satisfaction of the property and business transferred.

Charlie Korte, son of Korte, identifies the book in which were kept invoices, and states that the first part is in the hand

writing of Metzger and a clerk, and the last part in the hand writing of Korte. (See page 171). This in itself shows a change in the business.

Alegandro Branch testifies that he was the attorney for Korte and was present at the time Nolan and Veider claim that Korte admitted that he was in partnership with Metzger at time of Metzger's death. (See page 179).

Q. "Now, at any time when you were present in the Probate Court, as Henry Korte's attorney, state whether or not Korte said, in words or substance, that there had been no dissolution of the partnership?

A. I never heard him say so.

Also see page 181.

Q. Now, since the year 1873, what do you know, if anything, about who was the owner and the manager of the store here in Mora, as between these men?

A. I don't know anything about it.

Q. Who paid the taxes on the real property here at that time?

A. During the time I was sheriff, Henry Korte.

Q. Who seemed to have charge of the business there?

A. It looked to me that Henry Korte had charge of it.

Did Frederick Metzger pay any taxes on any property aside from the store?

A. I don't know that he paid for the store, or how he paid. He paid on $12,000."

Juan Jose Gallegos (of Mora) states, on page 184, the following:

Q. "Do you know whether they were merchandizing together or not?

A. All I know is that one time Frank Metzger went to Europe, Henry remained in the store. Another time Henry Korte went to Europe and Frank Metzgar shut up the store and didn't sell any goods.

Q. Was that before or after 1873?

A. After 1873."

Also page 185.

Q. "Who seemed to have the management of the business after 1873, Henry Korte or Frank Metzger?

A. Henry Korte.

Also page 186.

Q. "State whether or not Frank Metzger ever said anything to you about whether he was in business with Henry Korte after the year 1873?"

A. "At the time that Henry Korte went to Europe, a great

many people used to come to buy goods there at the store. He refused to sell them; some requested him to sell them goods, and he answered, "I don't want to attend to any more business; this business belongs to Henry and I am too old to attend to any more business; besides he says, I only have one daughter and don't need to work any more, or to go into any other business."

Q. "What position do you hold at this time, if any?"

A. "I am justice of the peace of precinct No. 1, Mora county, New Mexico."

"Acts speak louder than than words." It is proven that when Metzger was away business continued and when Korte went away business ceased. This fact alone seems to carry more weight than all surmises and conversations reported on other side.

The seventh fact found by the Master seems correct, and to prove that Metzger had no real estate and was not interested in the business or property of Henry Korte for years prior to his death. The eigth and ninth finding seem correct. The tenth fact seems correct, except that actual value could readily have been obtained from Assessor's records and from evidence.

We submit that not one single point showing any right or title of Viviana Martin and her children in any property real or personal owned by Metzger at his death has been proven.

We consider it proven that for some time prior to Metzger's death he had no interest except as a friend and well-wisher in the business or property of Henry Korte or in the property owned by Korte and his wife.

It will appear that, while Metzger and Korte were in business for years prior to 1873, the real estate was not considered as belonging to the partnership, except two pieces which were apparently acquired in the course of business. Metzger had a right to deed his property for a consideration or without, and no one has a right to question such a transfer. The real estate not being partnership property with the exceptions above stated, it is hardly reasonable to suppose that it was deeded to Henry Korte as a firm name for Korte and Metzger. The deed to Korte and wife can not be assumed to be to Metzger and Korte, doing business under the firm name of Henry Korte.

Certainly without absolutely conclusive proof to the contrary deeds, when duly recorded, should be taken for what they state and should transfer property to the beneficiaries named.

The deeds were recorded and the ownership of the property not questioned from 1873 to 1886, and if any property were not transferred, it was certainly covered by the declaration of

Metzger filed in the Probate Court, and would be the property of Juana the wife of Henry Korte as was certainly the intention of Metzger.

We submit that the manifest desire of Metzger should be carried out. If the appellees are successful, the property will go to the children of Viviana Martin and not to the wife of Henry Korte as desired.